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Public Prosecutor v Saifulzainizam bin Mat Nasir

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(H)-407–08 OF 2018
ABDUL KARIM, VAZEER ALAM AND GUNALAN MUNIANDY JJCA
22 JULY 2021

C *Criminal Procedure — Appeal — Appeal against sentence — Respondent pleaded guilty to reduced charge of possession under s 12(2) of Dangerous Drugs Act 1952 punishable under s 39A(2) of same Act — Respondent sentenced to eight years imprisonment and ten strokes of whipping — Whether sentence imposed for offence was manifestly inadequate and not commensurate with gravity of offence*

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This was an appeal by the prosecution ('the appellant') against the sentence which was imposed on the accused ('the respondent') by the learned judge of the High Court ('LJ'). The respondent was charged under s 39B(1)(A) of the
E Dangerous Drugs Act 1952 ('DDA'). The respondent pleaded guilty to a reduced charge of possession under s 12(2) of the DDA punishable under s 39A(2) of the same Act. The LJ sentenced the respondent to eight years imprisonment from the date of arrest and ten strokes of the whip. Hence, this appeal. It was the submission by the appellant that: (a) the sentence imposed by
F the LJ was manifestly inadequate in view of the gravity of the offence charged; and (b) the LJ had erred in principle when he failed to consider the public interest and the facts which called for a deterrent sentence.

Held, allowing the appeal:

G (1) The public interest element should prevail over the personal interests of the respondent considering the intention of the Legislature in enacting s 39A(2) of the DDA. The weight of the offending drugs found in the respondent's possession was an important factor in determining the
H appropriate sentence within the range prescribed by law. The quantity of the drug, which was more than three times the minimum, should be considered huge that ought to attract a deterrent sentence and not one that was less than half of the maximum which the LJ decided to impose. The sentence of eight years' imprisonment imposed by the LJ was plainly
I and manifestly inadequate. Considering the maximum sentence prescribed under the provision, any sentence of less than ten years' imprisonment would not be appropriate and sufficiently reflected the public interest element and the deterrent factor (see paras 12, 20–21 & 30).

(2) There were sufficient merits in the appellant's appeal that warranted appellate intervention in the decision of the LJ of the High Court. Therefore, the sentence of eight years imprisonment imposed by the High Court was set aside and substituted with an enhanced sentence of 12 years imprisonment to take effect from the date of arrest while the sentence of whipping of ten strokes would be maintained (see para 32).

[Bahasa Malaysia summary

Ini adalah rayuan oleh pihak pendakwaan ('perayu') terhadap hukuman yang dijatuhkan kepada tertuduh ('responden') oleh hakim Mahkamah Tinggi yang bijaksana ('HMT'). Responden didakwa di bawah s 39B(1)(A) Akta Dadah Berbahaya 1952 ('ADB'). Responden mengaku bersalah atas pertuduhan milikan yang dikurangkan di bawah s 12(2) ADB yang dihukum di bawah s 39A(2) Akta yang sama. HMT menjatuhkan responden hukuman penjara selama lapan tahun dari tarikh tangkap dan sepuluh kali sebatan. Oleh itu, rayuan ini. Hujahan oleh perayu bahawa: (a) hukuman yang dijatuhkan oleh HMT jelas tidak memadai memandangkan keseriusan kesalahan yang didakwa; dan (b) HMT pada asasnya terkhilaf pada prinsipnya ketika gagal mempertimbangkan kepentingan umum dan fakta-fakta yang memerlukan hukuman pencegahan.

Diputuskan, membenarkan rayuan:

(1) Elemen kepentingan umum harus diutamakan atas kepentingan pribadi responden memandangkan niat badan perundangan dalam menguatkuasakan s 39A(2) ADB. Berat dadah yang dijumpai dalam pemilikan responden merupakan faktor penting dalam menentukan hukuman yang sesuai dalam jangkauan yang ditentukan oleh undang-undang. Kuantiti ubat, yang melebihi tiga kali minimum, harus dianggap besar yang perlu menarik hukuman pencegahan dan bukan yang kurang daripada separuh maksimum yang diputuskan oleh HMT. Hukuman penjara selama lapan tahun yang dijatuhkan oleh HMT nyata dan jelas tidak memadai. Dengan mempertimbangkan hukuman maksimum yang ditetapkan di bawah peruntukan, hukuman penjara yang kurang dari sepuluh tahun adalah tidak wajar dan cukup menggambarkan elemen kepentingan awam dan faktor pencegah (lihat perenggan 12, 20–21 & 30).

(2) Terdapat merit yang mencukupi dalam rayuan perayu yang memerlukan campur tangan rayuan dalam keputusan HMT Mahkamah Tinggi. Oleh itu, hukuman penjara lapan tahun yang dijatuhkan oleh Mahkamah Tinggi diketepikan dan diganti dengan hukuman penjara 12 tahun yang berkuatkuasa mulai tarikh tangkap sementara hukuman sebat sepuluh sebatan akan dikekalkan (lihat perenggan 32).]

Cases referred to

Adam bin Atan v PP [2008] MLJU 402; [2009] 1 CLJ 33, CA (refd)
Ang Chai Seng v PP [2000] 2 MLJ 35, CA (refd)
Bhandulananda Jayatilake v PP [1982] 1 MLJ 83, FC (refd)
Chang Liang Sang & Ors v PP [1982] 2 MLJ 231; [1982] CLJ Rep 74, FC (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167, CA (refd)
Neo Hup Yee v Fong Yen Sia [2009] MLJU 1417, HC (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256; [1976] 1 LNS 102 (refd)
PP v Ooi Teng Chian [2006] 1 MLJ 213, CA (refd)
Sau Soo Kin v PP [1975] 2 MLJ 134, FC (refd)
Tia Ah Leng v PP [2004] 4 MLJ 249, CA (refd)
Union of India v Kuldeep Singh AIR [2004] SC 827, SC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 12(2), 39A(2), 39B(1)(A)

Appeal from: Criminal Trial No 45A-2–01 of 2017 (High Court, Shah Alam)

Faizah bt Salleh (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Ashok Kandiah (Syed Mohamed Ashiq bin Syed Mohamed Buhari with him) (Kandiah Partnership) for the respondent.

Gunalan Muniandy JCA:

INTRODUCTION

[1] This is an appeal by the prosecution (appellant) against the sentence which was imposed on the accused (respondent) by the learned judge of the High Court ('LJ') dated 26 July 2018.

BACKGROUND FACTS

[2] On 23 April 2018, the respondent was charged under s 39B(1)(A) of the Dangerous Drugs Act 1952 ('the DDA').

[3] On 26 July 2018, the respondent pleaded guilty to a reduced charge of possession under s 12(2) or punishable under s 39A(2) of the DDA. The reduced charge reads as follows:

> Bahawa kami pada 4 Ogos 2016, jam lebih kurang 4.30 pagi bertempat di rumah No 5G, Blok 20, Seksyen 28, Taman Alam Megah Shah Alam, di dalam Daerah Petaling, dalam Negeri Selangor Darul Ehsan, telah ada dalam milikan kamu dadah berbahaya iaitu 103.62 gram Methamphetamine dan dengan itu kamu telah

melakukan suatu kesalahan di bawah Seksyen 12(2) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39A(2) Akta yang sama.

[4] The LJ sentenced the respondent to eight years imprisonment from the date of arrest and ten strokes of the whip.

SUBMISSION BY THE APPELLANT

[5] It was the submission by the appellant that the sentence imposed by the LJ was manifestly inadequate in view of the gravity of the offence charged.

[6] It was submitted that the LJ had erred in principle when he failed to consider the public interest and the facts which call for a deterrent sentence. The guilty plea of the respondent cannot automatically entitle the respondent to a lesser punishment.

SUBMISSION BY THE RESPONDENT

[7] Counsel for the respondent submitted that the respondent pleaded guilty at the first opportunity and had thus, saved great expense and a lengthy trial. It is trite that a guilty plea is a mitigating factor. It is also trite that a guilty plea would give rise to a reduction between one-quarter and one-third of the sentence that would be usually passed for the same kind of offence.

[8] The respondent is a first-time offender and has a clean record which is certainly a mitigating factor that has always been recognised by the courts.

[9] The LJ heard the submissions by the prosecution and the accused and had correctly applied principles of sentencing and meted out a sentence that is adequate. Therefore, the sentence imposed by the LJ need not be enhanced as it is sufficiently deterrent.

OUR DECISION

[10] The sole issue for our determination against the sentence imposed by the LJ on the respondent on a reduced charge of possession under s 12(2) read with s 39A(2) of the Dangerous Drugs Act, 1952 ('the DDA') was whether the sentence imposed for the said offence was manifestly inadequate and not commensurate with the gravity of the offence.

[11] In essence, the learned deputy public prosecutor ('DPP') submitted that the LJ had failed to give due consideration to the element of public interest, which is the paramount factor in sentencing and instead, gave undue emphasis to the interests of the accused ('respondent') without regard to the

aggravating factors of importance highlighted to the court. This, it was argued was reflected in the term of imprisonment imposed that was only eight years which showed that the principles of sentencing and proportionality had not been correctly applied to arrive at a balance between the interest of the respondent and the gravity of the offence.

[12] In our view, the learned DPP was right in contending that in principle the public interest element should prevail over the personal interests of the respondent considering the intention of the Legislature in enacting s 39A(2) of the DDA which was to combat the drug menace in our society. Hence, the public interest should be regarded as the overriding factor.

[13] Our attention was drawn to a case of *Tia Ah Leng v Public Prosecutor* [2004] 4 MLJ 249, which is squarely in point, where the seriousness of drug-related offences was emphasised as follows:

> ... The Government and the legislature have taken very serious views in the abuse of usage of dangerous drugs. Drug addictions are rampant and the Government as well as the legislature have tried to curb these addictions especially amongst youths but met with little success. Death sentences and heavy penalties have been introduced but we find drug addicts everywhere. The addiction to drugs have led to other offences such as thefts, burglary and snatch thefts. Some of these offences lead to serious consequences. The seriousness of the offences on drugs have been made known since the seventies. Eminent judges have expressed this in so many cases.

[14] We are also in agreement with the learned DPP that the public interest element would be best served by imposing deterrent sentences that would directly or indirectly protect the public from drug offenders and the consequences of their actions on public order (see *Chang Liang Sang & Ors v Public Prosecutor* [1982] 2 MLJ 231; [1982] CLJ Rep 74).

[15] In respect of grave offences that are prevalent such as drug possession in big quantities, the protection of the public interest would outweigh pleas in mitigation personal in nature to the offender.

[16] We note that over the past decades the superior courts have time and again emphasised the importance of passing deterrent sentences for drug offenders in view of the public interest element and the need to protect society from these offenders. We take judicial notice of the prevalence of this category of offences until today without any signs of abatement.

[17] As far back as 1976, His Lordship Hashim Yeop A Sani J (as he then was) in *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256; [1976] 1 LNS 102, in a landmark judgment, after tracing the series of legislative amendments to the Dangerous Drugs Ordinance 1952 enhancing the penalties prescribed

therein, remarked that:

> It is common sense to say that behind these legislative exercises was the government's realisation albeit gradual, of the problem of drug abuse in this country, the degenerating effect of the misuse of dangerous drugs and the attendant dangers it has posed to society itself. The amendments passed by Parliament therefore reflect the public policy. It must be presumed that behind the public policy is the consideration of public interest.
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> The change in the attitude of the legislature itself during the last three years reflects the seriousness of the problem. In my view the courts will not be performing their functions honestly if the seriousness of the situation is not reflected in the sentence imposed or if the sentence appears to defeat the object of the statute. This is not saying that the Courts in the treatment of drug offences should at all times be severe. Each case has to be determined on its own merits. But in every case the Courts must be realistic and rational.

(See also *Union of India v Kuldeep Singh* AIR 2004 SC 827.)

[18] Considering the social impact of drug related offences, which are indisputably heinous in nature, as stressed in the *Union of India* case, the courts should not adopt a liberal attitude or take too sympathetic a view and to impose meagre penalties that would be counter-productive in the long run and against societal interest ultimately.

[19] In our case, the question was whether the eight years term of imprisonment imposed by the LJ was commensurate with the seriousness of the offence with which the respondent was charged and had satisfied the public interest element. Had the LJ taken a sufficiently serious view of the offence charged and considered the quantity of drugs found in the possession of the respondent he would, in all likelihood, not have imposed the present sentence (see *Adam bin Atan v Public Prosecutor* [2008] MLJU 402; [2009] 1 CLJ 33).

[20] We accept the learned DPP's contention that the weight of the offending drugs found in the respondent's possession is an important factor in determining the appropriate sentence within the range prescribed by law. In this case, it is significant that s 39A(2) of the DDA under which the offence charged is punishable prescribes a minimum custodial sentence of five years imprisonment with whipping of not less than ten strokes and a maximum of life imprisonment, equivalent to not more than 30 years.

[21] It was highlighted to us that the weight of the drugs, methamphetamine, recovered from the respondent was 103.62g. whereas the minimum weight for this type of dangerous drug for a charge to be preferred under a 39A(2) of the DDA is only 30g. As such, the quantity of the drug, which was more than three times the minimum, should be considered huge

that ought to attract a deterrent sentence and not one that is less than half of the maximum which the LJ decided to impose. Although we have not had the benefit of the LJ's grounds of decision, we would surmise that the LJ did not appear to have taken a sufficiently serious view of the severity of the respondent's offence consistent with the need to safeguard the public interest. Hence, in our view, the sentence of eight years' imprisonment imposed by the LJ is plainly and manifestly inadequate under the present circumstances.

[22] Based on the facts presented by the prosecution which the appellant had admitted before the conviction was recorded, there were various other implements and devices recovered from the respondent all of which related to activities involving dangerous drugs. This, too, is an important factor that seems to have been overlooked by the LJ.

[23] On the whole, the lenient sentence imposed by the LJ would not have the deterrent effect to eradicate offences involving drugs which are regarded as an ongoing national problem that has not abated over many decades. Thus, the sentence imposed must reflect the need to serve the public interest when faced with grave and prevalent offences like the possession of a substantial quantity of drugs (see *Public Prosecutor v Ooi Teng Chian* [2006] 1 MLJ 213).

[24] In the above case, *Public Prosecutor v Ooi Teng Chian* the guilty plea by the respondent, it was held, ought not be regarded as a predominant factor that would justify a lenient sentence being passed below the usual trend for this type of offence.

[25] In urging this court not to intervene in the sentence meted out by the High Court, it was submitted for the respondent that the sentence was in all the circumstances peculiar to this case fair and does not justify appellate intervention.

[26] Among the landmark cases cited in support by the respondent is *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83 where Raja Azlan Shah LP, held that:

> Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description?
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> It is for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, per se, to warrant this court's interference.

[27] Further, in the Court of Appeal case of *Ang Chai Seng v Public Prosecutor* [2000] 2 MLJ 35 (CA) which reiterated the above principles with regard to appellate intervention of sentencing, Haidar JCA (as he then was) held as follows:

> The power of sentencing is a discretionary one and it has been a firmly established principle that an appellate court would be slow to disturb the sentence imposed by the lower court unless the sentence is excessive to such an extent as to satisfy this court that when it was passed there was a failure to apply the right principles then this court will intervene (*R v Kenneth John Ball 35 Cr App R 164*). According to Hashim Yeop Sani J (as he then was) *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256 at p 257G: 'It is a firmly established practice that the court will not alter a sentence merely because it might have passed a different sentence'.

[28] In a nutshell, the respondent impressed upon us the mitigating factors present in the High Court as follows:

(a) the respondent on 26 July 2018 had pleaded guilty to the optional charge and had saved great expense and a lengthy trial. It is trite a guilty plea is a mitigating factor as per the decision of *Sau Soo Kin v Public Prosecutor* [1975] 2 MLJ 134 (FC). It is also trite that a guilty plea would give rise to a reduction between one-quarter and one-third of what otherwise would have been the sentence as held by Mohamed Azmi SCJ in *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167 (CA);

(b) in another High Court case involving similar facts *Neo Hup Yee v Fong Yen Sia* [2009] MLJU 1417, the learned trial judge, Akhtar bin Tahir JC (as he then was) sentenced the accused who was caught in possession of 674.3g of methamphetamine to a seven year term of imprisonment from date of arrest;

(c) in the course of sentencing, respondent in giving his plea in mitigation had expressed remorse for his action, stating that he had a wife who was unemployed and two children; and

(d) the prosecution in the course of sentencing submissions failed to submit on any aggravating factors aside from a sentence in the public interest and an inference that ought to be drawn that the respondent intended to sell the drugs in his possession, which is not a recognised aggravating factor.

[29] The respondent also sought to rely on several High Court decisions where sentences ranging from 7–8 years' imprisonment were imposed for the same type of offence punishable under s 39A(2) of the DDA for bigger quantities of dangerous drugs.

[30] On these purportedly crucial points, suffice for us to say that the

comparative sentences were from cases that were decided about 8–15 years ago. In our view, those cases do not reflect the current trend of sentencing for the offence of drug possession punishable under s 39A(2) of the DDA. We agree with the learned DPP that considering the maximum sentence prescribed under the provision, any sentence of less than ten years' imprisonment would not be appropriate and sufficiently reflect the public interest element and the deterrent factor. It would, on the contrary, send a wrong message to would be offenders and the public at large that the court would, in some instances, deal leniently with drug offenders charged with serious offences such as that punishable under s 39A(2) of the DDA. As regards the respondent's plea pertaining to the difficulties that he would face as a husband and father of two children, it is trite principle that a plea of this nature does not carry much weight as an accused person ought to have been aware of his responsibilities and the consequences of his actions before turning to a life of crime.

CONCLUSION

[31] For the reasons abovementioned as explained by us, we would, with respect, conclude that the LJ had erred in principle on the side of leniency by imposing a sentence that was, in our considered view, plainly and manifestly inadequate that was not commensurate with the seriousness of the offence with which the respondent was charged. It was also in disregard of the current trend of sentencing for drug related offences wherein the public interest and deterrence take precedence over any mitigating factor personal to the accused.

[32] In the circumstances, we find sufficient merits in the PP's appeal that warrants appellate intervention in the decision of the LJ of the High Court. We, therefore, allow the appeal, set aside the sentence of eight years imprisonment imposed by the High Court and substitute it with an enhanced sentence of 12 years imprisonment to take effect from the date of arrest while the sentence of whipping of ten strokes would be maintained.

Appeal allowed.

Reported by Ahmad Ismail Illman Mohd Razali